Montana Law Review

Volume 22
Issue 2 *Spring 1961*

Article 10

January 1961

Proof of Official Records in Federal Cases

Lester B. Orfield
Professor of Law, Indiana University

Proof of Official Records in Federal Cases

By LESTER B. ORFIELD*

Rule 27 of the Federal Rules of Criminal Procedure entitled "Proof of Official Record" provides:

> An official record or an entry therein or the lack of such a record may be proved in the same manner as in civil cases.

Rule 44 of the Federal Rules of Civil Procedure entitled "Proof of Official Record" provides:

> (a) AUTHENTICATION OF COPY. An official record or an entry therein, when admissible for any purpose, may be evidenced by an official publication thereof or by a copy attested by the officer having legal custody of the record, or by his deputy, and accompanied by a certificate that such officer has the custody. If the office in which the record is kept is within the United States or within a territory or insular possession subject to the dominion of the United States, the certificate may be made by a judge of a court of record of the district or political subdivision in which the record is kept, authenticated by the seal of the court, or may be made by any public officer having a seal of office and having official duties in the district or political subdivision in which the record is kept, authenticated by the seal of his office. If the office in which the record is kept is in a foreign state or country, the certificate may be made by a secretary of embassy or legation, consul general, consul, vice consul or consular agent or by any officer in the foreign service of the United States stationed in the foreign state or country in which the record is kept, and authenticated by the seal of his office.
>
> (b) PROOF OF LACK OF RECORD. A written statement signed by an officer having the custody of an official record or by his deputy that after diligent search no record or entry of a specified tenor is found to exist in the records of his office, accompanied by a certificate, as above provided, is admissible as evidence that the records of his office contain no such record or entry.
>
> (c) OTHER PROOF. This rule does not prevent the proof of official records or of entry or lack of entry therein by any method authorized by any applicable statute or by the rules of evidence at common law.

HISTORY OF DRAFTING RULE 27

Rule 44 of the First Draft of the Rules of Criminal Procedure, dated September 8, 1941, was identical with Rule 44 of the Federal Rules of Civil

*Professor of Law, Indiana University. A.B. 1924, LL.B. 1927, University of Minnesota; S.J.D. 1929, University of Michigan. Member of United States Supreme Court Advisory Committee on Rules of Criminal Procedure. General Consultant American Law Institute Model Code of Evidence.

Procedure. The same was true of Rule 72 of the Second Draft, dated January 12, 1942, and Rule 71 of the Third Draft, dated March 4, 1942. Rule 29 of the Fourth Draft, dated May 18, 1942, was identical with the rule as finally adopted.

A draft, known as Preliminary Draft, dated May, 1942, omitted any rule on the subject. This draft was submitted to the Supreme Court for comment. The Court made no comment on the absence of a rule.

The Fifth Draft, dated June, 1942, was also silent on the subject. Rule 25 of the Sixth Draft, dated Winter, 1942-1943, restored the rule. The Reporter in a memorandum to the Advisory Committee stated that there had been some misapprehension of the purpose of the rule. The Advisory Committee had dropped the rule after very brief discussion. The note to Rule 44 of the Federal Rules of Civil Procedure indicated that the purpose was to provide "a simple and uniform method of proving public records." If there were no criminal rule on the subject there would have to be proof according to the provisions of an applicable statute. Such statutes are very numerous. Their lack of uniformity is the principal argument for the inclusion of the proposed rule in a system of rules designed to promote, among other things, uniformity and simplicity. Rule 25 of the First Preliminary Draft (seventh committee draft) was to similar effect.

Judge Gunnar H. Nordbye of the District of Minnesota praised the rule since uniformity between criminal and civil cases is highly desirable.[1] Judge George C. Taylor of the Eastern District of Tennessee thought that the Rule should not be a mere reference to the Civil Rule, but the rule should be complete in itself.[2] Not all commissioners are lawyers, nor do all of them have access to the Federal Rules of Civil Procedure. Some lawyers engaged largely in criminal practice do not have copies of the Civil Rules and may not have ready access to them. It would not be prohibitively expensive to have all the rules complete in one volume.

Rule 29 of the Second Preliminary Draft, dated February, 1944, was to similar effect as Rule 25 of the First Preliminary Draft.

James B. McNally, United States Attorney for the Southern District of New York objected to incorporation by reference of the Federal Rules of Civil Procedure.[3] The rule should be spelled out in full. At a meeting of the Philadelphia Chapter of the Federal Bar Association, Thomas McBride moved that the language "or the lack of such a record or entry" be stricken out.[4] His reason was that this procedure was substantially prejudicial to the defendant's right of confrontation and cross-examination. The motion was seconded and carried.

Rule 29 of the Report of the Advisory Committee, dated June, 1944, was to similar effect. The United States Supreme Court made no change. As two prior rules were omitted the rule became Rule 27.

[1] COMMENTS, RECOMMENDATIONS, AND SUGGESTIONS RECEIVED CONCERNING THE PROPOSED FEDERAL RULES OF CRIMINAL PROCEDURE 161 (1943).
[2] *id.* 449 (1943).
[3] *id.* 106 (1944).
[4] *id.* 61 (1944).

FEDERAL PROCEDURE PRIOR TO RULE 27

It was held at an early time that a copy of a public document furnished by an officer whose duty it is to keep the original may be introduced into evidence.[5] In a leading case a Court of Appeals stated:[6]

> There can be no doubt that official records kept by persons in public office, which records are required to be kept either by statute or by the nature of the office, are admissible to prove transactions occurring in the course of official duties, within the personal observation of the official recording the transactions, without any further guarantee of their accuracy.

In a prosecution for destruction of property on a ship with intent to injure the insurer a certified and sworn copy of a custom-house record of a ship's manifest was admitted without other evidence of the shipmaster's signature.[7] A certified copy was thus permitted to prove the genuineness as well as the contents of a document. The defendant was, however, acquitted.

Under a federal statute[8] on records a properly authenticated copy of a record in the office of the Commissioner of Pensions was held admissible in a criminal prosecution for withholding a pension, to prove the pension and that the pensioner named in the indictment was entitled to it.[9] A certificate by the Commissioner of Pensions that an accompanying paper "is truly copied from the original in the office of the Commissioner of Pensions," taken together with a certificate signed by the Secretary of the Interior and under the seal of that Department, certifying to the official character of the Commissioners of Pensions, is a sufficient compliance with the statute. It made no difference that the certificate by the Secretary of the Interior referred only to the official character of the Commissioner of Pensions, and the credit to which his attestations were entitled.

[5]United States v. Percheman, 32 U.S. (7 Pet.) 51,85 (1833); Corbett v. Gibson, 6 Fed. Cas. 530 (No. 3221) (E.D.N.Y. 1879). See 5 WIGMORE, EVIDENCE § 1677, at 743 (3d ed. 1940).

Judge Learned Hand stated in Lembeck v. United States Shipping Board Emergency Fleet Corp., 9 F.2d 558, 559 (2d Cir. 1925): "It was early established by the Supreme Court that 'on general principles,' and regardless of statutes, copies of public documents, properly certified by their custodian, were competent evidence without the production of the originals. . . . The rule is quite independent of any statute. . . ."

For a criminal case to the same effect see Breitmayer v. United States, 249 Fed. 929, 932, 933 (6th Cir. 1918). The Government was allowed to introduce into evidence a birth certificate.

[6]Greenbaum v. United States, 80 F.2d 113, 126 (9th Cir. 1935). The case was followered in Olender v. United States, 210 F.2d 795, 801, 42 A.L.R.2d 736 (9th Cir. 1953).

For cases in accord see Heike v. United States, 192 Fed. 83, 94 (2d Cir. 1911); McInerney v. United States, 143 Fed. 729, 736 (1st Cir. 1906).

The introduction of official records does not violate the right to confrontation of witnesses. Heike v. United States, 192 Fed. 83, 94, 95, *aff'd*, 227 U.S. 131, 144 (1913); People v. Nisonoff, 293 N.Y. 597, 59 N.E.2d 420, 422 (1944), *cert. denied*, 326 U.S. 745 (1945); State v. Pearson, 223 S.C. 377, 76 S.E.2d 151, 153 (1953); Runde v. Commonwealth, 108 Va. 873, 61 S.E. 792, 793 (1908); Commonwealth v. Slavski, 245 Mass. 405, 140 N.E. 465, 467, 29 A.L.R. 281 (1923).

[7]United States v. Johns, 4 U.S. (4 Dall.) 412, 415 (1906). See the critical comment in 5 WIGMORE, EVIDENCE § 1677, at 746 (3d ed. 1940).

[8]Rev. Stat. § 882 (1875), now incorporated in 28 U.S.C. § 1733 (1958).

[9]Ballew v. United States, 160 U.S. 187, 191 (1895).

In a prosecution for murder on a ship a copy of its certificate of enrollment certified under seal by the deputy collector of customs of the port where issued was held admissible to establish its national character.[10] The court relied on the federal statute[11] under which copies of any papers or documents, in any of the executive departments, under the seal of the proper department, are made admissible in evidence equally with the original. The genuineness of the authentication of such a certificate, signed by a deputy collector of customs, apparently in order, was held to be a matter to be assumed, as was also the official character of the purported signer and the signing by him or one authorized to sign for him, where there was no evidence casting suspicion on the genuineness of the copy of the seal or the signature, and none which challenged in any way the national character of the ship.

In a prosecution for violation of the Espionage Act through remarks shaking public confidence in the Red Cross it was held that a financial statement sent to a county chairman of the Red Cross committee from the general office of the society was not admissible.[12] The identifying witness had no knowledge of the truth of the report. The Government should have obtained a copy of the official report. An act of Congress required annual reports from the Red Cross to the Secretary of War. Such report was required to contain an itemized report of receipts and expenditures. Since such report was so easily obtainable the rule against hearsay evidence should not be relaxed.

In a prosecution for receiving stolen property, letters and documents, which had been used as evidence in naval court-martial proceedings and were required by law to be transmitted to the Navy Department and kept on file for two years, were held to be official documents while so on file and admissible under the statute.[13] The court pointed out that the statute was intended to apply to any document or paper which is by law required to be filed and kept on file in any of the executive departments of the Government.[14] A paper which must be kept on file in a designated office and which cannot be removed therefrom, pertains to that office and so becomes official. The court pointed out that Congress began legislating on the subject of official records from the very beginning.[15] An Act passed in 1789 provided that all copies of records and papers in the office of the Department of State should be admissible.[16] In 1797 a similar act was passed with respect to the Treasury Department.[17] The court stated that it was not holding that copies can be received in evidence only when they are authenticated under the seal of the department. The statute was not intended to

[10]Wynne v. United States, 217 U.S. 234, 245 (1910).
[11]REV. STAT. § 882 (1875), now incorporated in 28 U.S.C. § 1733 (1958).
[12]Granzow v. United States, 261 Fed. 172 (8th Cir. 1919).
[13]Note 11, *supra*.
[14]Cohn v. United States, 258 Fed. 355, 358, 362 (2d Cir. 1919). At 359 the court held that the originals should have been accounted for as unavailable. See the criticism in 4 WIGMORE, EVIDENCE § 1219, at 401-403 (3d. ed. 1940). He suggests that the grounds for the ruling are obscure.
[15]Cohn v. United States, 258 Fed. 355 (2d Cir. 1919). See also Wong Wing Foo v. McGrath, 196 F.2d. 120, 123 (9th Cir. 1952).
[16]1 Stat. 69 (1789).
[17]1 Stat. 512 (1797).

be exclusive. But as to unauthenticated copies a proper foundation for their admission must be laid.

Under the same statute it was held in a prosecution for presenting false accounts against the United States that it was proper to admit in evidence photostatic copies of accounts made by the defendant, an internal revenue agent, for his expenses at certain hotels, which, after payment, were lodged as permanent records at Washington, D. C.[18] Likewise in a prosecution for using the mails to defraud by sending false property statements to obtain credit for a corporation, capital stock returns made by the president of the corporation and filed with the Internal Revenue Department were held to be admissible as official records.[19] It made no difference that the returns were not generally open to inspection. In a prosecution for using the mails to defraud by selling unsecured notes of a corporation through fraudulent representations concerning its financial condition, certified copies of income tax returns made by the corporate officers are admissible as official records.[20] The only proof was a certificate of the governmental custodian. In a prosecution for using the mails and conspiracy to use the mails, to defraud, photostatic copies of the original income tax returns of the corporation alleged to have been employed by the defendants are admissible where properly certified.[21]

In a prosecution for using the mails to defraud by a stock selling scheme, unsigned and uncertified cards from the Internal Revenue Office in Arizona, purporting to transcribe certain income tax returns, were held not admissible.[22] The unfairness was said to be that the defendants could not cross examine the unknown writer nor could they obtain the original return or a copy thereof.[23] Even assuming that the cards were public records this would not cure violations of the hearsay and best evidence rules. Possibly the cards were not accurately transcribed from the income tax returns.

In a prosecution for using and conspiring to use the mails to defraud, charts made from official records, purporting to show defaults in the payment of taxes were admitted in an opinion by Judge Charles E. Clark.[24] Production of the tax records would have been a practical impossibility. Procurement of certified copies as authorized by New York statute would have been very expensive. The records were in official custody equally open to inspection by the defendant, hence secondary evidence was admissible to prove their contents. Moreover an act of Congress provided that writings and records made in the regular course of any business, where

[18]Kurzrok v. United States, 1 F.2d 209, 211 (8th Cir. 1924).
[19]Lewy v. United States, 29 F.2d 462, 464, 62 A.L.R. 388 (7th Cir. 1928), *cert. denied*, 279 U.S. 850 (1929). The statute has now become 28 U.S.C. § 1733 (1958).
[20]Lewis v. United States, 38 F.2d 406, 413 (9th Cir. 1930).
[21]Mansfield v. United States, 76 F.2d 224, 231 (8th Cir. 1935), *cert. denied*, 296 U.S. 601 (1935).
[22]Greenbaum v. United States, 80 F.2d 113, 126 (9th Cir. 1935).
[23]It has been asserted that the real question as to the effect of the error should have been, whether in fact the defendants did dispute the correctness of this purporting copy. 5 WIGMORE, EVIDENCE § 1680, at 776 (3d. ed. 1940).
[24]United States v. Mortimer, 118 F.2d 266, 269 (2d Cir. 1941). The case was distinguished on its facts in Hartzog v. United States, 217 F.2d 706, 710 (4th Cir. 1954).

it is the regular course of such business to make them, are admissible in any court.[25]

In a prosecution for violation of the Securities Act of 1933, construing a requirement of the Securities and Exchange Commission that all registered dealers in oil royalties should file "offering sheets," the court held that such sheets, offered for the purpose of showing that the defendant had sold at prices so far beyond any reasonable expectation that he could not honestly have believed what he told his customers, were improperly admitted under the statute on official records,[26] although they were official in that by a regulation of the Commission the dealers were required to file them; they were not such documents as were competent evidence "of all that they record," and the dealers were not officials of the state or government; the transactions they recorded had not come under their personal cognizance; those who had primary knowledge of the matters were not their subordinates; and the statements proposed to be shown were not binding on the defendant, so that the exception to the hearsay rule applicable to official records could not be invoked.[27]

Under a federal statute on post office records[28] copies of records of the Post Office Department have been admitted in evidence as copies of official records in a number of cases. It was so held as to a regular report made by a postmaster concerning his financial dealings to those to whom he was required by law to make it.[29] The prosecution was for making a false report to the auditor of the Treasury Department acting for the Post Office Department. Records were held admissible in a prosecution of an assistant postmaster for embezzlement where the Government offered in evidence, as copies of official records, duly certified transcripts of quarterly reports made by the postmaster, showing the condition of his office.[30] The defendant had contended that they were hearsay evidence and not binding on him because they were signed only by the postmaster, although they were shown to be in the defendant's handwriting, and referred to the amount of stamps and money in question, and had evidently been prepared by the defendant.

Entries made by a jailor of a public jail in Alabama, in a record book kept for that purpose, of the dates of the receiving and discharging of a prisoner confined therein, made by him in the discharge of his public duty as such officer, are admissible in evidence in a federal criminal prosecution although no statute of the state required such entries.[31] The defendant was

[25]28 U.S.C. § 695 (1940) now incorporated in 28 U.S.C. § 1732 (1958).
[26]28 U.S.C. § 661 (1940) now incorporated in 28 U.S.C. § 1733 (1958).
[27]United States v. Grayson, 166 F.2d 863, 868 (2d Cir. 1948).
[28]REV. STAT. § 889 (1875), now incorporated in 28 U.S.C. § 1733 (1958).
[29]United States v. Snyder, 14 Fed. 554, 557 (C.C.D. Minn. 1882).
[30]McBride v. United States, 101 Fed. 821, 824 (8th Cir. 1900). The prosecution was for embezzlement.
[31]White v. United States, 164 U.S. 100, 102 (1896). This case was cited later for the proposition that no difference has been recognized between documents of federal, state and county governments. Olender v. United States, 210 F.2d 795, 801, 42 A.L.R.2d 736 (9th Cir. 1954).

In one case the court held that a certificate as to records in Rumania was inadmissible for lack of evidence that the record was kept in compliance with and in conformity to the law of Rumania; but that the criminal defendant must make more than a general objection. Duncan v. United States, 68 F.2d 136, 138 (9th Cir.

prosecuted for presenting false claims to a United States marshal to obtain the payment of fees for certain witnesses allegedly brought before a United States commissioner.

The probative value of official records was considered in one case. Where a defendant in a prosecution for selling liquor, in order to establish an alibi introduced testimony of an undertaker that the defendant was attending a funeral, copies of the death certificate and burial records were without probative value and should not have been received in rebuttal as evidence that burial was on another day; and if received the jury should have been advised that the death record had no probative value in view of the testimony of the undertaker, even though state statutes made death records prima facie evidence of the facts therein stated.[32] The court stated incidentally that examined copies of public records are admissible in evidence at common law and implied that they are at the present time.

There may be some situation in which neither foreign official records nor copies thereof may be obtainable. In such cases secondary evidence will be admissible. In a prosecution under the Foreign Agents Registration Act the admission, without a showing of unavailability of the letters themselves, of secondary evidence of the contents of letters which passed between the German Consul General in New York and the German Chargé d'Affaires in Washington was not error.[33] The trial judge, over objection under the best evidence rule, took judicial notice of the inviolability of diplomatic correspondence and the existence of a state of war with Germany.

In an early case the Supreme Court held that where the issue was whether a marriage register did not contain an entry of a certain marriage, production of the records was required.[34] But the objection must be taken before trial as by a motion to suppress. If the objection is taken later there is a waiver. But eight years later the Supreme Court took a different view.[35] In this case the books were outside of the state and beyond the jurisdiction of the court. The results may be proved by the person who made the examination. Since this could be done to establish the affirmative, *a fortiori* it can be done to establish the negative. Depositions of persons examining the books were introduced into evidence. In a prosecution for embezzlement while acting as a paymaster clerk, admission of evidence for the government that certain payrolls, the originals of which were shown to be in the possession of the Government at Washington, D. C., did not contain receipt signatures after the names of 56 employees was held not reversible error in view of the negative character of the evidence.[36] It should be noted that there was testimony by witnesses in position to know.

1933). The decision is regarded as an example of strict construction in MORGAN, MAGUIRE & WEINSTEIN, CASES ON EVIDENCE 125-26 (4th ed. 1957).

[32]Passantino v. United States, 32 F.2d 116 (8th Cir. 1929).

[33]Viereck v. United States, 139 F.2d 847, 850 (D.C. Cir. 1944).

[34]Blackburn v. Crawfords, 70 U.S. (3 Wall.) 175, 183, 191 (1865).

[35]Burton v. Driggs, 87 U.S. (20 Wall.) 125, 135-36 (1873). This case was distinguished and not applied in a prosecution for using the mails to defraud. Shreve v. United States, 77 F.2d 2 (9th Cir. 1935), *cert. denied*, 296 U.S. 654 (1936). In the latter case, however, corporation records were involved.

[36]Gutinsky v. United States, 259 Fed. 378, 379 (5th Cir. 1919).

Moreover the loss was established independently of the witness' evidence that the payrolls were not receipted. The modern tendency is to relax the rule as to secondary evidence and not to apply it to instruments only collaterally involved in the case. In a prosecution of an assistant postmaster for unlawfully depositing money order remittances to the credit of other postal accounts in which there was a shortage, a postal inspector was properly permitted to testify that he found no record in the money order accounts of two specified remittances of money order funds.[37] In a prosecution for using the mails to defraud by alleging that one defendant had a claim pending against the United States Treasury, testimony that no such claim was found in the Treasury records was admitted.[38] In a prosecution for violation of the Tariff Act, permitting an inspector of customs to testify that the custom house records disclosed no permit to import liquor was not error as against the objection that the records were the best evidence.[39] The inspector was in charge of the records and familiar with them. In a prosecution for fraudulent use of the mails in the selling and delivery of unregistered securities and consipracy to violate the Securities Act it was held proper to admit as an official record in support of the Government's position that the securities were not registered, authenticated certificates that a search of the record of the Commissioner's Office failed to disclose that any registration certificate had been filed.[40] There was also testimony of an employee of the defendant that he had asked the defendant concerning registration and had been told that it was unnecessary. Furthermore the defendant did not controvert the allegation or evidence of nonregistration. In a prosecution for unlawful possession of gasoline ration coupons, testimony of the chief clerk of the ration board, from whose office the gasoline coupons had been stolen, that the gasoline coupons possessed by the defendant had not been issued to any person, was properly received over objection that the records of the board would constitute the best evidence.[41]

RULE 27 AS INTERPRETED IN THE DECISIONS

Authentication of Copy

The purpose of Rule 44 of the Federal Rules of Civil Procedure has been thus stated in a leading case:[42]

> The Report of the Advisory Committee on Rules, as well as the statements of some of the commentators which have been published in book form, indicate, in substance, that Rule 44(a) covers, and is designed to cover the subject matter of numerous sections of Title 28, U.S.C.A., as well as of other titles, of the United States Code dealing with methods of proving documents that originate in a department or branch of the Government. The rule does not interfere with any of the methods prescribed by those sections.

[37]Petersen v. United States, 287 Fed. 17, 24 (9th Cir. 1923).
[38]Stearn v. United States, 18 F.2d 465, 467 (4th Cir. 1927).
[39]Shore v. United States, 56 F.2d 490, 491 (D.C. Cir. 1932).
[40]United States v. Sussman, 37 F. Supp. 294, 295 (E.D. Pa. 1941). The court referred to 28 U.S.C. § 661 (1940), formerly the principal statute on official records.
[41]Randall v. United States, 148 F.2d 234, 235 (5th Cir. 1945), *cert. denied*, 325 U.S. 885 (1945).
[42]United States v. Aluminum Co. of America, 1 F.R.D. 71, 76 (S.D.N.Y. 1939).

> Generally they provide for admission in evidence upon certification of a document by some designated official. The rule merely adds another method for authenticating departmental documents. I take it further that the purpose of the rule was to reduce delay and to reduce expense in obtaining from Government departments documents intended to be offered in evidence.

It may be burdensome and inconvenient and expensive to call a public officer to court.[43] In cases involving documents in foreign countries, the reason for the rule is obvious. It is not, however, the function of the rule to reveal *when* a fact must be proved by an official record.[44]

Even though there were no statute or rule of court it would appear that official records are admissible. Judge Charles E. Clark has stated: "But, as Wigmore points out, the 'official statements' exception to the rule excluding hearsay is 'good common law' though, as he adds, 'the numerous petty statutory rules have made the Bar suppose they must always find a statute.' 5 Wigmore on Evidence, 3rd ed. 1940, sec. 1638a."[45]

Virtually all cases on the subject involve official records offered in evidence by the Government. In a state court case no error was found in the rejection of the records of a local draft board offered in evidence by the defendant which were properly challenged upon the ground that a certified copy thereof was not sufficiently authenticated to make it admissible.[46]

What is meant by an official record? The general rule is that "the authenticity of an official document is sufficiently established when a copy of it is offered which purports to have been printed by authority of the Government."[47] Records are said to be official if the work is "done by a person in the employment of the Government in the course of the performance of the duties of his position."[48] There are a number of limitations on the admissibility of official records. Since "official records are a substitute for the appearance of the public official himself, so far as records sought to be admitted in evidence deal with observed facts, ordinarily they should concern matters to which the official, himself, could have testified if called in person."[49] Governmental records are allowed in evi-

[43]Olender v. United States, 210 F.2d 795, 801, 42 A.L.R.2d 736 (9th Cir. 1954); Vanadium Corp. v. Fidelity & Deposit Co., 159 F.2d 105, 109 (2d Cir. 1947); Gilbert v. Gulf Oil Corp., 175 F.2d 705, 710 (4th Cir. 1949); Wong Wing Foo v. McGrath, 196 F.2d 120, 123 (9th Cir. 1952). See MCCORMICK, EVIDENCE § 294, at 417, and § 292, at 615 (1954); 4 WIGMORE, EVIDENCE § 1218, at 398 (3d ed. 1940).

[44]United States v. Scoblick, 225 F.2d 779, 782 (3d Cir. 1955). The question was the corporate existence of the criminal defendant. Other evidence in the case showed the corporate existence.

[45]Vanadium Corp. v. Fidelity & Deposit Co., 159 F.2d 105, 109 (2d Cir. 1947). See also Olender v. United States, 210 F.2d 795, 800, 42 A.L.R. 2d 736 (9th Cir. 1954); Vlisidis v. Holland, 150 F. Supp. 678, 684 (E.D. Pa. 1957).

[46]Edmonds v. State, 201 Ga. 108, 39 S.E.2d 24, 37 (1946). For cases on the topic of this article see DEC. DIG., Evidence §§ 338-349, Cirminal Law § 430.

[47]United States v. Aluminum Co. of America, 1 F.R.D. 71, 75 (S.D.N.Y. 1939).

[48]*Ibid.*

[49]Williamson v. Union Oil Co., 125 F. Supp. 570, 572 (D. Colo. 1954); Yaich v. United States, 283 F.2d 613, 616 (9th Cir. 1960). *Accord*: Franklin v. Skelly Oil Co., 141 F.2d 568, 572, 153 A.L.R. 156 (10th Cir. 1944); Vanadium Corp. of America v. Fidelity & Deposit Co., 159 F.2d 105, 109 (2d Cir. 1947); United States v. Indian Creek Marble Co., 40 F. Supp. 811, 816 (E.D. Tenn. 1941); Yung Jin Teung v. Dulles, 229 F.2d 244, 247 (2d Cir. 1956); United States v. Grayson, 166 F.2d 863, 868 (2d Cir. 1948); Olender v. United States, 210 F.2d 795, 801, 42 A.L.R.2d 736

dence as an exception to the hearsay rule because when records are made under the authority or direction of law, there is a presumption that the public officer charged with a duty has performed it well and that public officers usually have no motive to suppress or distort the truth or to manufacture evidence. This exception to the hearsay rule has its qualifications. Records made by public officers will not be admissible if they relate to causes and effects, involving the exercise of judgment and discretion, expressions of opinions or the making of conclusions.[50] On the other hand there is no requirement that the record must be made public before it qualifies for admission. As Judge Charles E. Clark has stated:[51]

> The rule speaks of "official" records, not "public" records. The use of the term "public" in the Advisory Committee's note to Rule 44 and in 28 U.S.C.A. Par. 695e may well have been merely as a synonym for "official." We see no necessity for reading into rule or statute a requirement that the original must be open to examination by the public. The faith placed in certified copies of official records is not based upon the assumption that the opposing party will detect forgeries and alterations, but upon the assumption that the oath and certificate of the custodian may reasonably be relied upon.

For the purposes of applying the rule as to official records no distinction has been recognized between documents of federal, state, and county governments.[52]

Income tax records and returns and certificate of assessments and payments of taxes are official records.[53] The selective service file of one prosecuted for failing to report for induction in the armed forces of the United States is an official record.[54]

When part of the papers from the official files of a county public welfare department relating to old age security benefits paid to the defendant's

---

(9th Cir. 1954). Contrary cases are cited in Olender v. United States, 210 F.2d at 801 n.1.

See 5 WIGMORE, EVIDENCE § 1646 (3d ed. 1940). Wigmore concludes that the law is uncertain.

[50]Franklin v. Skelly Oil Co., 141 F.2d 568, 573, 153 A.L.R. 156 (10th Cir. 1944); Williamson v. Union Oil Co., 125 F. Supp. 570, 572 (D. Colo. 1954); Gilbert v. Gulf Oil Corp., 175 F.2d 705, 710 (4th Cir. 1949); Hanley v. Westchester Fire Ins. Co., 23 F.R.D. 640, 648 (W.D. Mich. 1959).

[51]Banco de Espana v. Federal Reserve Bank, 114 F.2d 438, 446 (2d Cir. 1940). See 5 MOORE, FEDERAL PRACTICE § 44.02 at 1515 (1951); Annot., 50 A.L.R.2d 1197 (1956); 5 WIGMORE, EVIDENCE § 1634 (3d ed. 1940).

[52]Olender v. United States, 210 F.2d 795, 801, 42 A.L.R.2d 736 (9th Cir. 1954). *Accord*: E. K. Hardison Seed Co. v. Jones, 149 F.2d 252 (6th Cir. 1945); Gilbert v. Gulf Oil Corp., 175 F.2d 705, 710 (4th Cir. 1949).

[53]Holland v. United States, 209 F.2d 516, 520 (10th Cir. 1954), *aff'd*, 348 U.S. 121 (1954); Desimone v. United States, 227 F.2d 864, 867 (9th Cir. 1955).

[54]Kariakin v. United States, 261 F.2d 263, 265 (9th Cir. 1958). The defendant did not contend that he did report for induction. The file was admitted into evidence without objection by defendant's experienced counsel. See also Yaich v. United States, 283 F.2d 613, 616 (9th Cir. 1960). The facts that a questioned letter from national headquarters of the selective service system to California headquarters of the system bore no pagination, bore no receipt stamps by the Sacramento office, and contained punch holes at the top of the page did not compel the conclusion that such letter was not a part of the defendant's selective service file or that such letter had been included in the file after certification.

mother-in-law had not been prepared by public officials pursuant to the duties of their office, but were merely statements of private individuals to the welfare department in aid in investigation of the financial needs of the mother-in-law, such papers were not admissible in evidence as official documents in a prosecution for income tax evasion for the purpose of rebutting the defendant's testimony that certain money in his possession was a gift from his mother-in-law.[55]

Work sheets of a deputy collector of internal revenue made preparatory to the prosecution of an income tax evasion case are not books or records of account or documents of a governmental agency.[56] In a prosecution for illegal distilling it was held that sales records which the seller of sugar was required to make and submit to the government were not official records and were not admissible.[57]

As a prerequisite for admission into evidence, Rule 44(a) requires that the copy of the record must be properly certified and this must be accompanied by a certificate of the affiant that he has legal custody of the records. These two requirements, proper attestation and certificate of custody, have produced a large part of the litigation which has arisen from Rule 44.[58]

Photostats authenticated under the seal of the General Accounting Office were held to be properly admitted into evidence.[59] A permit form with general conditions printed on its back accompanied by a certificate of the Deputy Secretary of Highways of a state and issued under the seal of the Department of Highways met the state regulations and the requirements of Rule 44 and was therefore properly admitted into evidence.[60]

In a prosecution in a state court for murder, the court held admissible

[55]Olender v. United States, 210 F.2d 795, 800, 42 A.L.R.2d 736 (9th Cir. 1954).
[56]Hartzog v. United States, 217 F.2d 706, 708 (4th Cir. 1954). The court applied 28 U.S.C. § 1733 (1958) on government records.
[57]Mathews v. United States, 217 F.2d 409, 415, 50 A.L.R.2d 1187 (5th Cir. 1954). The court applied 28 U.S.C. § 1733 (1958) on government records.

See also Sunset Motor Lines v. Lu-Tex Packing Co., 256 F.2d 495, 499 (5th Cir. 1958), where the court assumed arguendo that a United States Department of Agriculture form, comprising a punch card for machine accounting was an official record. But no certification was found.

[58]In one case the court rejected in reliance on Criminal Rule 27 the contention of the defendant that the form of certification of authenticity of a government exhibit was improper without, however, disclosing the contents of the exhibit. United States v. Grady, 225 F.2d 410, 417 (7th Cir. 1955), *cert. denied*, 350 U.S. 896 (1955).

It has been concluded that in habeas corpus cases rules as to authentication are enforced, though only state court cases are cited. Note, 58 MICH. L. REV. 1218, 1225 n.59 (1960).

A writing which purports to be an official record and which is proved to have come from the proper public office where such papers are kept, is generally considered to be sufficiently authenticated. United States v. Ward, 173 F.2d 628, 629 (2d Cir. 1949). The court relied on Federal Criminal Rule 26 rather than 27. Where the photostatic copy of the defendant's selective service record bears the certificate of the administrative officer, California state headquarters for Selective Service, who certifies that the attached record is a full, true and correct copy of the original selective service record of the defendant, and that the original records are on file in the office of the local draft board, there is sufficient authentication. Yaich v. United States, 283 F.2d 613, 616-617 (9th Cir. 1960).

[59]United States v. Conti, 119 F.2d 652, 656 (1st Cir. 1941).
[60]McDonald v. Pennsylvania R.R. Co., 210 F.2d 524, 529 (3d Cir. 1954). The court suggested that issues of this kind should be taken up at pre-trial so as to avoid a lengthy trial.

a copy of the dental chart of the deceased kept as a permanent record in the Bureau of Medicine and Surgery of the Department of the Navy.[61] Certification was as in the manner provided in a federal statute[62] and as at common law.

In two cases records were admitted but the party who prepared the record did not testify. In a civil case the trial court refused to allow in evidence an order fixing maximum rental charges purporting to be signed by J. C. Watts as Area Rent Director. The Area Rent Attorney testified as to this signature but the trial court was not convinced that he knew such signature, except that he had seen it frequently in files which are in his custody. On appeal this holding was reversed. The Court of Appeals stated:[63]

> Both the rent reduction order and the signature thereon were shown to be genuine. In any event, neither were challenged as to authenticity or impeached by any proof or testimony to the contrary. . . . It was not essential to produce the Rent Director who issued the order to establish its authenticity, nor to account for his absence from the trial, where there was no challenging testimony to attack its genuineness.

In a criminal case the defendant was tried for failure to submit to induction into the armed forces. An objection was raised that although the draft file was produced by the secretary of the board, no member of the board testified. On appeal the court simply affirmed by holding that the file was properly received into evidence "under the federal business document rule."[64] An early case stated that the right to confrontation of witnesses is not violated though the persons making the records are not called, as this was the rule before the Constitution.[65]

A passport case illustrates a failure to comply with Rule 44. The Government attempted to place into evidence copies of certain records called "Status Reports." They contained information on the history of passport applications made by certain individuals. The court held that uncertified typewritten and photostatic copies of "Status Reports" are not properly authenticated copies as required by Rule 44.[66] The court also stated that even the Status Reports would not be admissible because "it does not appear that they relate to matters within the personal knowledge of the persons who made the records and as to which they could testify." The requirement for proper certification is also enforced as to foreign official records. In one case a party plaintiff attempted to place into evidence a photostat of an alleged copy of a contract. This copy was certified by the Czechoslovakian Court of Commerce in Prague and by the Czechoslovakian Consulate General in Paris who had not seen the original. The copy was verified by the Court of Commerce on the basis of testimony it had heard

[61]Pressley v. State, 207 Ga. 274, 61 S.E.2d 113, 115 (1950).
[62]28 U.S.C. § 1733 (1958).
[63]Woods v. Turk, 171 F.2d 244, 245 (5th Cir. 1948).
[64]United States v. Borisuk, 206 F.2d 338, 340 (3d Cir. 1953). The court also cited Federal Civil Rule 44 and Federal Criminal Rule 27.
[65]Heike v. United States, 192 Fed. 83, 95 (3d Cir. 1911). Compare People v. Dow, 64 Mich. 717, 31 N.W. 597, 598 (1887).
[66]Tung Jin Teung v. Dulles, 229 F.2d 244, 246-47 (2d Cir. 1956).

in a prior suit between the plaintiff and a third party. The court held that such "certifications would not satisfy the requirements of 28 U.S.C. § 1741 or Rule 44(a) Federal Rules of Civil Procedure 28 U.S.C. governing the admission in evidence of foreign documents of record."[67]

Under Rule 44(a) an official record may be evidenced "by a copy attested by the officer having the legal custody of the record, or by his deputy." The term "legal custody" has been broadly interpreted:[68]

> The short answer to this contention is that Rule 44 contemplates that the officer having immediate custody of the records must make the attestation. Furthermore, the word "deputy," as contained in this rule, means the duly appointed representative of the Attorney General, in this case. In either case, the attestation by the Records Administration Officer of the United States Department of Justice clearly satisfies the requirements of Rule 44 of the Federal Rules of Civil Procedure, and therefore also of Rule 27 of the Federal Rules of Criminal Procedure.

One of the leading federal criminal cases shedding light on the problem of proper attestation as well as on the requirements of the certificate of custody is *Mullican v. United States.*[69] Three different records were examined and two of the three were held to be inadmissible for failure to meet the requirements of Rule 27 of the Federal Rules of Criminal Procedure and Rule 44 of the Federal Rules of Civil Procedure. The defendant objected to the admissibility of Government Exhibits 2, 3 and 4. Exhibit 2 was a photostatic copy of the record of judgment and sentence of the District Court for the Southern District of Texas. Included also was a copy of the return of the United States Marshal showing the delivery of the defendant pursuant to his sentence to the Federal Reformatory. The court held that both documents were properly authenticated by the certificate of the clerk of the court with the seal of the court affixed and were therefore properly admitted. A copy of a record may be produced by photographic process. Exhibit 3 was a group of photostatic copies of documents, one of which purported to be a copy of a letter from the Director of the Bureau of Prisons designating the Federal Reformatory to be the place of confinement for the defendant. The certificate of authentication was signed by the Acting Director of the Bureau of Prisons with the seal of the Bureau affixed. But the certificate recited that the original of the letter was in the files of the United States Marshal at Houston. The court held: "The original document not being in the custody of the Bureau of

[67]Machaty v. Astra Pictures, 197 F.2d 138, 140-41 (2d Cir. 1952). The court also excluded a Prague judgment for lack of authentication. There was a question as to whether the United States official's certification evidenced only the fact that the Czech certifying officer was an official translator for the court or whether it also evidenced that the Czech certifier was the lawful custodian of the judgment.

[68]United States v. Ansani, 138 F. Supp. 454, 461 (N.D. Ill. 1956). The case was affirmed in 240 F.2d 216 (7th Cir. 1957) without consideration of this point.

In McWilliams v. United States, 105 F. Supp. 582, 589 (E.D. La. 1952), it was held that official documents should be accompanied by a certificate that the attesting officer has the custody of the records. Although this was an admiralty case the court referred to Rule 44 of the Federal Rules of Civil Procedure.

[69]252 F.2d 398, 70 A.L.R.2d 1217 (5th Cir. 1958). The Court of Appeals reversed a conviction and remanded for a new trial because of errors in admission of Government Exhibits 3 and 4.

Prisons, we think the purported authentication by its acting director would not meet the requirements of the rules of admissibility.'"[70] The certificate was faulty because it did not show that the photo copies were made from the official documents or true copies of the official documents. The certificate was also insufficient because although signed by the Acting Director, it did not recite that the Acting Director had custody of the original documents or even had official duties in the political subdivision where the records were kept. The same defect was found in Exhibit 4.

In one case the documents sought to be introduced into evidence consisted of a photostatic copy of an application for a title for a motor vehicle signed by a deputy of the Manager of Revenue of Denver, Colorado; a certificate bearing the signature of a section chief acting for Robert A. Theobald, the Director of Revenue of the State of Colorado, certifying that the attached document was a true photostatic copy of an original which was on file in his department; and a certificate by the Secretary of State of Colorado certifying as to the correctness of an attached executive order appointing Theobald Director of Revenue. The court pointed out: "In the instant case it is seen that the certificate of the Secretary of State does not certify that the Director of Revenue has custody of the records of applications and thus, technically, it does not meet the requirements of 44(a)."[71] But the court relied more on what it thought a serious defect, namely, that the certificate signed by only a deputy of the Director of Revenue lacked the seal of the office of the Director of Revenue. The Colorado statute provided for such seal.

The same technical approach has also been used to deny admission to copies of records, the originals of which were kept in a foreign country. In one case a certificate was made by the Mayor of a town in Poland that the defendant Brabina had been married there. The court stated that this "document is authenticated by a certificate of the vice consul of the United States at Warsaw, Poland, but his certificate does not comply with the requirements of Rule 44 . . . because it does not certify that the Mayor of Poreba is the 'lawful custodian' of the record of which exhibit 6 is an 'extract'." Hence the document was incompetent if objection was properly taken to its admission.[72] The defendant raised the point sufficiently even though his precise objection was that the exhibit was an extract of a certificate and was not a certified copy of a certificate or a photostat of it.

The requirements of Rule 44(a) clearly are not too severe and can be met as shown in concrete cases. In a leading case the trial court held that the following sequence of events fulfilled the necessary requirements for the admission of copies of official records from Poland.[73] The records were first attested by the Registrar of Vital Statistics of Non-Christian Denominations, with his seal of office attached. The authenticity of the Registrar's signature and seal and that the birth certificate had been issued in accordance with Polish law, was certified under the seal of office by the

[70] *Id.*, 252 F.2d at 401.
[71] Van Cedarfield v. Roche, 252 F.2d 817, 821 (1st Cir. 1958).
[72] United States v. Grabina, 119 F.2d 863, 865 (2d Cir. 1941). The action was to cancel a certificate of citizenship.
[73] New York Life Ins. Co. v. Aronson, 38 F. Supp. 687, 688 (W.D. Pa. 1941).

County Commissioner. This signature and seal, and that the birth certificate was in proper form, was certified under the signature of the Governor's Agents and the seal of the Governor of the Province was also present. The genuineness of the Governor's seal and signature was certified by the Chief of Department of the Ministry of the Interior of Poland. Finally this signature was certified as being true and genuine by the Vice Consul of the United States in Warsaw. The "records were properly admitted under the requirements of Rule 44 and the Act of 1936, and the common law." In another case the Vice Consul of the United States, with respect to records in Spain, "attests that 'each of the documents quoted in the certificate of Don Adolfo Sisto Hontan . . . was duly certified to the said Don Adolfo Sisto Hontan who . . . was the Under Secretary of the Ministry of Finance and was, as such, authorized by the Minister of Finance to sign each of the documents certified to by him; such Minister of Finance being the lawful custodian of the original of each document.' "[74] Technically Rule 44 was not followed because the certificate shows that the custody of the record was in the Ministry of Finance, while it was the Under Secretary who made the certification. Judge Charles E. Clark resolved this defect by saying: "The variation between the Ministry and its Under Secretary is unimportant."

In a civil case it was held that admission in evidence of unauthenticated photostats of records, though not proper, did not constitute reversible error when proper certified photostatic copies were thereafter filed and were available for consideration prior to rulings on motions for summary judgment and for judgment notwithstanding the verdict.[75] The opposing party made no claim that the unauthenticated photostats were not bona fide, and made no showing of prejudice from the conditional reception of the copies.

Error in the exclusion of an official report may sometimes amount to harmless error. Thus in a civil case harmless error was found where several witnesses were produced who testified to the facts contained in the report, including a witness who had assisted in the preparation of the report.[76] Improper exclusion can be raised on a motion for new trial.

Proof of Lack of Record

Rule 44(b) presents the technical, mechanical problems of subsection (a), and also an underlying constitutional problem. Is Rule 44(b) as applied in Federal Criminal Rule 27 to criminal cases, unconstitutional because it denies a criminal defendant the right to be confronted with the witnesses against him under the Sixth Amendment?[77] This issue is raised when the following conditions are present. The first is that there has been admitted in evidence a certificate of an officer that he has made a diligent search of records in his custody but has not found the information for which

[74]Banco de Espana v. Federal Reserve Bank, 114 F.2d 438, 446 (2d Cir. 1940). The lower court had taken the same view. 28 F. Supp. 958, 972 (S.D.N.Y. 1939).
[75]Steffen v. United States, 213 F.2d 266, 269 (6th Cir., 1954).
[76]Hanley v. Westchester Fire Ins. Co., 23 F.R.D. 640, 649 (W.D. Mich. 1959).
[77]For general discussions of the right to confrontation see Orfield, *Depositions in Federal Criminal Procedure*, 9 S.C.L.Q. 376, 392-98 (1957).
For discussion of proof of no entry see 4 WIGMORE, EVIDENCE § 1244(5), at 469, 5 *id.* § 1678, at 752-56 (3d ed. 1940).

he was asked to search. The second requirement is that this certificate must be a necessary element of the case of the party who had offered the certificate into evidence.

These conditions were present in *T'Kach v. United States*[78] in which the defendant was criminally prosecuted for fraudulent and false representation that he was a personal envoy of the President of the United States. The Government for the purpose of showing that the defendant was without any official status entered into evidence an affidavit, properly authenticated, of a personnel officer of the White House having custody of all records of officers and employees at the White House. This affidavit stated that the affiant had diligently searched and found no record showing that the defendant had ever been employed as a representative of the President. The affidavit was received under Rule 27. The defendant urged that this affidavit denied him of his right to be confronted with the witnesses against him. The court stated in a terse ruling: "The affidavit was admissible under Rule 27, supra, and the rule does not violate the constitutional right of confrontation."[79] The court cited three prior federal decisions which do not necessarily support its conclusion.

In the first case[80] the defendant was convicted of perjury before a congressional committee. He objected to the admission into evidence of a resolution of the House of Representatives, emanating from its Judiciary Committee, that no minutes were kept of the meeting. The court stated that this resolution "should be given no less effect than the written statement of an officer having custody of an official record. Furthermore, under the rules of evidence at common law, see Rule 44(c), supra, it was not essential to produce the book itself to prove that it did not contain the entries."[81] It is very important to notice that the Clerk of the House of Representatives testified that he had examined the record book and no minutes were found.[82] The clerk had legal custody of the minutes book. Furthermore a resolution of the House of Representatives, stating that no minutes had been kept was entered into evidence. This case then is not one in which the certificate of an officer that the records did not contain certain information is put into evidence, but rather is one where the officer himself testified that he had examined the records and had not found what he sought for. Thus the issue of confrontation did not arise in this case. The defendant had an opportunity to cross-examine the officer who searched the records, while in the *T'Kach* case he did not. The court cited prior cases in which the officer testified at the trial.[83]

[78]242 F.2d 937 (5th Cir. 1957).
[79]*Id.* at 938. In a leading state court case it was held that the clerk who made the search must be present. If he was not the right to confrontation of witnesses was violated. People v. Bromwich, 200 N.Y. 385, 93 N.E. 933, 934 (1911), *affirming* 135 App. Div. 67, 119 N.Y. Supp. 833, 836 (1909).
[80]Christoffel v United States, 200 F.2d 734 (D.C. Cir. 1952).
[81]*Id.* at 739.
[82]*Id.* at 737.
[83]See Shore v. United States, 56 F.2d 490, 492 (D.C. Cir. 1932). The same view was taken by the Municipal Court of Appeals of the District of Columbia. Bussie v. United States, 81 A.2d 247, 248 (Mun. Ct. of App. D.C. 1951). As to the latter court there was no statute or rule of court. See also McDonold v. United States, 200 F.2d 502, 504 (5th Cir. 1952); De Casaus v. United States, 250 F.2d 150, 152 (9th Cir. 1957).

A second case[84] cited by the court does not support its view. The case involved tax evasion and objection was taken to the admission of certain tax assessment lists. The defendant objected that the records did not technically meet the requirements of Rule 44 in that they were not properly certified and the agent who produced them did not prepare them or have official custody of them or have personal knowledge of their content. It appears quite clear that these objections are based on different issues from those raised in the *T'Kach* case. There was a witness who could be cross-examined concerning the search of the records.

The third case[85] cited by the court also arose in the Fifth Circuit but did not directly involve Rule 44, but rather a federal statute on records made in the regular course of business[86] and a federal statute on government records and papers.[87] The issue in the case was whether or not reports of sugar sales were admissible. The court held that they were not but then went on to say that even if they were admissible under the statutes the question may well be posed whether admission of the reports

> might not be contrary to the right of accused persons to confrontation of witnesses. . . . It has been uniformly held that that right may not be invoked to exclude evidence otherwise admissible under well established exceptions to the hearsay rule. . . . But if Congress attempted to create new exceptions to the hearsay rule which were contrary to the sound principles underlying that rule, the very principles which must have been contemplated by the drafters of the Sixth Amendment, could we properly say these were 'legitimately created' or that they did not violate the Constitutional Right of confrontation in criminal cases? We think not. While the Sixth Amendment does not prevent creation of new exceptions to the hearsay rule based upon real necessity and adequate guarantees of trustworthiness, it does employ those requirements as essential to all exceptions to the rule, present or future. To hold otherwise would be to hold that Congress could abolish the right of confrontation by making unlimited exceptions to the hearsay rule.[88]

This last opinion sets forth an ascertainable standard by which the constitutionality of Rule 44(b) may be determined. Does Rule 44(b) fall into an already recognized exception to the hearsay rule? If it does not, is it based upon real necessity and adequate guarantees of trustworthiness? If it fails to meet at least one of these tests, then it should be held unconstitutional as to criminal cases.

The effect of Rule 44(b) is that the admission of the certificate takes the place of the officer in testifying as to the necessary facts. The defendant has no opportunity to examine the officer as to his experience, the

[84]Holland v. United States, 209 F.2d 516, 520-21 (10th Cir. 1954), *aff'd*, 348 U.S. 121 (1954).
[85]Matthews v. United States, 217 F.2d 409, 412, 50 A.L.R.2d 1187 (5th Cir. 1954).
[86]28 U.S.C. § 1732 (1958).
[87]28 U.S.C. § 1733 (1958).
[88]Matthews v. United States, 217 F.2d 409, 418, 50 A.L.R.2d 1187 (5th Cir. 1954). See also note 4, *supra*, and United States v. Konovsky, 202 F.2d 721, 727 (7th Cir. 1953).

number of records to be examined, the amount of time to do the job properly, the amount of time actually used, and the possibility of information being lost.[89] In effect the officer testifies secretly and away from the accused. This does not seem to be a recognized exception to the hearsay rule. There is no true necessity for such a rule. The government should either produce the officer as a witness at the trial, or allow the defendant to take a deposition.

On its peculiar facts it may be concluded that the *T'Kach* case does not necessarily lay down a harsh rule as to the rights of the criminal defendant. As the court stated of the defendant: "He took the stand on his own behalf and, responding to a question as to his authority to represent the President, testified 'I never said anything as to any authority because I had no authority.' This supplied proof of the same fact as the affidavit was intended to demonstrate."[90]

In one case the defendants were charged with failure to register as dealers in gambling devices. The Government introduced into evidence exhibits properly certified that the officer had made a diligent search and had uncovered no registration or monthly inventory or record of sales and deliveries of gambling devices. The defendants claimed that these certificates did not support the allegations of the indictment. The court stated: "If the defendants contend that they had registered it is incumbent upon them to prove that they had, in fact, registered."[91] The confrontation issue was not raised. The Court of Appeals affirmed the decision without discussing the issue.[92]

One effect of Rule 27 is that the defendant may not have discovery under Rules 16 and 17(c) to establish nonexistence of documents. In a prosecution for making a false statement to an investigating officer of the Commodity Credit Corporation it was held that the trial court did not err in refusing to allow the defendant to search through voluminous government customs records to determine whether export documents had been filed among such records.[93] It was sufficient that the nonexistence of such documents was testified to by two custodial agents, and that the thoroughness of their search was tested by cross-examination. The defendant's demand midway in the trial to inspect each of 60,000 documents would involve suspension of the trial for that purpose. The defendant made no showing that the search was likely to turn up any specified documents.

[89]See Bussie v. United States, 81 A.2d 247, 278 (Mun. Ct. of App. D.C. 1951); Wong Wing Foo v. McGrath, 196 F.2d 120, 123 (9th Cir. 1952). Compare, however, De Casaus v. United States, 250 F.2d 150, 152 (9th Cir. 1957), where the court states: "The nonexistence of such documents was testified to by two custodial agents, the thoroughness of their search being tested by cross-examination. This was far more than is required by Rule 44(b) . . . incorporated by reference in Rule 27 of the Federal Rules of Criminal Procedure."

[90]T'Kach v. United States, 242 F.2d 937, 938 (5th Cir. 1957).

[91]United States v. Ansani, 138 F. Supp. 454, 461 (N.D. Ill. 1956).

[92]United States v. Ansani, 240 F.2d 216 (7th Cir. 1957), *cert. denied*, 353 U.S. 936 (1957).

[93]De Casaus v. United States, 250 F.2d 150, 152, 154 (9th Cir. 1957).

Other Proof

Rule 44(c) is the least troublesome subdivision of the Rule. It merely provides that Rule 44 does not prevent the proof of official records or of entry or of lack of entry by any method authorized by any applicable statute or by the rules of evidence at common law.[94] In one case the court stated:[95]

> The 'docket slip' is clearly admissible in evidence under Rule 44(c) . . . since although it was not authenticated by publication or certificate under seal as subsection (a) of the Rule permits, it was fully authenticated by the direct testimony of the witness through whom it was introduced, and this fully satisfies the rules of evidence at common law.

In a prosecution for fraudulently obtaining and unlawfully possessing a passport, a photographic copy of the defendant's application for a passport authenticated by the authentication officer of the Department of State is admissible under the statute authorizing admissibility of documents on file with the Department if properly authenticated,[96] despite the absence of a certificate that the officer from whose custody they purport to come has the custody thereof.[97] Although there was no compliance with Rule 44(a) there was with Rule 44(c), made applicable by Rule 27, inasmuch as there was compliance with a statute.[98] Thus the evidence as to the American passport was admissible. The evidence as to the Canadian passport was also admissible.[99] The evidence as to the Canadian passport was admissible by the rules of evidence at common law. The application for a passport filled out by the defendant and identified by the court clerk before whom the defendant took the oath of allegiance and by the passport administrator was admissible by the rules of evidence at common law.

Foreign documents will be admissible in evidence if they are admissible under a state statute.[100] Rule 44 should be read in connection with Rule 43(a), the general rule on evidence. Rule 43(a) provides for the application of state rules of evidence favoring admissibility. The records are not admissible where no statutes or common law rules of evidence authorize admission.[101] Proof of lack of official record under Rule 44(b) is not the

[94]See United States v. Shafer, 132 F. Supp. 659, 666 (D. Md. 1955). The case involved injunction sought by the government.

[95]Brenci v. United States, 175 F.2d 90, 93 (1st Cir. 1949). A denaturalization proceeding was involved. The court stated that the standard of proof was comparable to that in a criminal case.

The "docket slip" consisted of a department form regularly used by the naturalization service as an office record of statements made by aliens when applying for citizenship. The slip showed criminal convictions. But in Cufari v. United States, 217 F.2d 404, 409 (1st Cir. 1954), the docket slip was found to be inadequate evidence.

[96]28 U.S.C. § 1733(b) (1958).

[97]Paquet v. United States, 236 F.2d 203, 205 (9th Cir. 1956).

[98]28 U.S.C. § 1733(b) (1958).

[99]Paquet v. United States, 236 F.2d 203, 206 (9th Cir. 1956).

[100]Fakouri v. Cadais, 147 F.2d 667, 671-72 (5th Cir. 1945). The proceeding was to have a will declared void. Certified copies of Brazilian documents were involved. There was no certificate that the certifying official was the legal custodian of the original document. Two statutes of Louisiana made the documents admissible.

[101]Van Cedarfield v. Laroche, 252 F.2d 817, 821 (1st Cir. 1958). The law of New Hampshire was involved. See also Sunset Motor Lines v. Lu-Tex Packing Co., 256 F.2d 496, 499 (5th Cir. 1958).

only way to prove lack of record. "To establish the fact that there is no record as to a particular matter or thing parol evidence may be given. The proof may be made by any qualified person who has examined the record as well as by the custodian."[102]

MODERN REFORM PROPOSALS

"Under the English common law the official duty to keep a record did not by implication include an official duty to issue a certified copy of the record."[103] But under an Act of Parliament of 1851[104] official records may be proved by certificate.[105] To be admissible in criminal cases copies of public documents usually are one or the other of three kinds: (1) certified copies or certificates, (2) examined copies, and (3) Queen's printers' copies. A certified copy or certificate is a copy of a public document signed and certified as a true copy by the officer to whose custody the original is entrusted. If the requirements of the Evidence Act of 1845, section 1, as to sealing are complied with, such officer need not be called as a witness to prove such copy. An examined copy is a copy which a witness at the trial swears he has compared with the original and found to be a true copy. A Queen's printers' copy is a copy printed by the Queen's printers of Acts of Parliament, and issued by the authority of Parliament, or a department or officer of the Government.[106] Less often used are exemplifications and office copies.[107]

The English concept of an official record is narrower than the federal concept. A public document in England is one prepared for the purpose of the public making use of it, with the object that all persons concerned in it may have access to it.[108] For example the regimental records of a serving soldier are not public documents.[109]

[102]Jackson v. United States, 250 F.2d 897, 901 (5th Cir. 1958).

[103]MORGAN, MAGUIRE & WEINSTEIN, CASES ON EVIDENCE 125 (4th ed. 1957). See also Tracy, *The Introduction of Documentary Evidence*, 24 IOWA L. REV. 436, 449 (1939).

[104]Evidence Act, 1851, 14 & 15 Vict. c. 99 s. 14 provides: "Whenever any Book or other Document is of such a public Nature as to be admissible in Evidence on its mere Production from the proper Custody and no Statute exists which renders its Contents provable by means of a Copy, any Copy thereof or Extract thereform shall be admissible in Evidence in any Court of Justice, or before any Person . . . having by law or by Consent of Parties Authority to hear, receive, and examine Evidence, provided it be proved to be an examined Copy or Extract, or provided it purport to be signed and certified as a true Copy or Extract by the Officer to whose Custody the Original is entrusted, and which Officer is hereby required to furnish such certified Copy or Extract to any Person applying at a reasonable Time for the same, upon Payment of a reasonable Sum for the same, not exceeding Fourpence for every Folio of Ninety Words."

[105]See KENNY, OUTLINES OF CRIMINAL LAW § 561, at 457 n.10 (17th ed. by Turner 1958); SHAW, EVIDENCE IN CRIMINAL CASES 170, 172 (3d ed. by Lee 1947); ROSCOE, CRIMINAL EVIDENCE 185 (16th ed. 1952); ARCHBOLD, PLEADING, EVIDENCE & PRACTICE IN CRIMINAL CASES 435 (32d ed. 1949).

[106]ARCHBOLD, PLEADING, EVIDENCE & PRACTICE IN CRIMINAL CASES 409-17 (32d ed. 1949); SHAW, EVIDENCE IN CRIMINAL CASES 174 (3d ed. by Lee 1947).

[107]These are defined and described in ARCHBOLD, PLEADING, EVIDENCE & PRACTICE IN CRIMINAL CASES 408 (32d ed. 1949). Exemplifications are copies under seals of State. Office copies are copies made by an officer of the court to which the document belongs.

[108]SHAW, EVIDENCE IN CRIMINAL CASES 173 (3d ed. by Lee 1947); KENNY, OUTLINES OF CRIMINAL LAW § 561, at 457 (17th ed. by Turner 1958).

[109]Pettit v. Lilley, [1946] K.B. 401.

Rule 517 of the American Law Institute Code of Evidence of 1942 entitled "Proof of Content of Official Record" lays down a rule embodying the provisions of Rule 44 of the Federal Rules of Civil Procedure. The rule should be read in connection with Rules 519 and 602 of the Institute Code. As Professor Morgan points out: "Written statements made by public officials and entries in public records by *ad hoc* officials are made generally admissible in the manner now commonly provided for by statute in the case of entries in records of vital statistics. The method of proving the content of an official record provided in Federal Rule 44 is adopted."[110] Rules 63(17), 68, and 69 of the Uniform Rules of Evidence accomplish a similar purpose.[111] Rule 68 has been criticized because it leaves in doubt whether other statutory methods of proving official records will remain in force.[112]

The Uniform Rules of Criminal Procedure adopted by the National Conference of Commissioners on Uniform Laws in 1952 contain no rule on the subject. Nor does the American Law Institute Code of Criminal Procedure.

The federal rule seems to be working smoothly. No amendments have been suggested by the Supreme Court Advisory Committee on Rules of Civil Procedure.

It would seem that the part of Rule 44 dealing with foreign official records is open to improvement.[113] Now and then it becomes necessary, doubtless more often in civil than in criminal cases, to prove births, deaths, marriages and other publicly recorded events which occurred in foreign countries. Usually the only practicable method of proof is to offer a copy[114] of foreign record, certified by the custodian of the original. Federal Rule 44 provides that such a copy shall be admissible if it is properly authenticated. Authentication serves three purposes as the following illustration indicates. Assume that the paper is a copy of a birth record kept in the office of the Vital Statistics Officer of the city of Nicosia, Italy. Assume that the copy purports to be certified by Vincenzo Nisi, who describes himself as such officer.[115] Three separate difficulties arise to be overcome by authentication. In the first place was the certificate in fact signed by Nisi? This is the question of genuineness. In the second place was Nisi at the time of certification the duly appointed officer? This is

[110] MODEL CODE OF EVIDENCE, p. 50 (1942).

[111] They are to be found in MORGAN, MAGUIRE & WEINSTEIN, CASES ON EVIDENCE, 864, 867-68 (4th ed. 1957); LADD, CASES ON THE LAW OF EVIDENCE 561, 699 (2d ed. 1955); MCCORMICK, CASES ON THE LAW OF EVIDENCE 589-90, 400 (3d ed. 1956). The comments of the Commissioners are set out in LADD AND MCCORMICK. For discussion of the Uniform Rules of Evidence see Wallace, *Official Written Statements*, 46 IOWA L. REV. 256 (1961). For a comparison of federal procedure with military law, see Selby, *Official Records and Business Entries: Their Use as Evidence in Court-Martial and the Limitations Thereon*, 11 MILITARY LAW REV. 41 (January 1961).

[112] Levin, *Authentication and Content of Writings*, 10 RUTGERS L. REV. 632, 640 (1956).

[113] SCHLESINGER, COMPARATIVE LAW 56-58 (2d ed. 1959).

[114] It should be a true copy and not a mere statement as to the contents made by a person not subject to cross-examination. *In re* Johnson's Estate, 172 Misc. 1075, 16 N.Y.S. 2d 855 (Surr. Ct. N.Y. Co. 1939). *Cf.* Delmore v. Brownell, 135 F. Supp. 470, 477 (D.N.J. 1955), *aff'd*, 236 F.2d 598, 601 (3d Cir. 1956).

[115] See the facts in the case cited in footnote 114 above.

the question of incumbency. In the third place was the Vital Statistics Officer the lawful custodian of birth records under Italian law? This is the question of authority. This last question is one of foreign law, namely, Italian law in this instance.

Rule 44 requires that an authentication covering all three of these points be issued by an American consul or diplomatic representative.[116] The document is not properly authenticated unless the consul uses words in the authentication clause to the effect "that the annexed document has been certified by the lawful custodian thereof."[117] In this situation the federal rule and statute do not seem workable. An American consul should not attest the genuineness of Nisi's signature if he has no access to a specimen of such signature. It may be that the Italian law prohibits Nisi from filing signature specimens with a foreign consul. Furthermore the American consul is scarcely in position to verify the fact that Nisi was duly appointed as Vital Statistics Officer of Nicosia. Possibly it may be proper to place reliance on assurances or certifications by higher Italian courts or officials. Yet such reliance might be unjustifiable in dealing with governments which are less friendly. Finally, it may be difficult for the American consul who is not necessarily a lawyer, and not an expert on Italian law, to determine the question whether under Italian law Nisi is the legal custodian of the original birth record. Consuls are not permitted to retain local counsel to advise them on such problems. In many parts of the world, especially behind the Iron Curtain, there are no United States diplomatic or consular officers who could make the certificate required by Rule 44.[118] Even in those countries where the United States has representatives the record office may be too far removed from the office of the mission to permit the certifying officer to verify personally either the genuineness of the signature, or the incumbency of the person signing as custodian.

Authentication of a copy of a foreign record in the federal courts may be accomplished in three ways: (1) by a diplomatic or consular officer of the United States under Rule 44(a); (2) under Rule 43(a) by applying state law; and (3) by the common law method or by an applicable statute under Rule 44(c).[119] But none of the three methods may be practicable in a given case. With respect to the question of genuineness the certifying foreign official is often not located in the same city as the consular office. The consul will not go to some remote village to watch the village clerk execute the signature. In fact such travel may be forbidden in an Iron Curtain country. As a consequence the consul will not be able to attest genuineness on the basis of his own observation. In practice, however, this difficulty is overcome by having the signature of the village clerk attested by a higher official or by a judge, whose signature in turn is at-

[116]To the same effect see 28 U.S.C. § 1741 (1958).
[117]2 FOREIGN SERVICE MANUAL 834-42. While an earlier treaty of 1878 between the United States and Italy contains a less strict authentication clause in its Article X, 20 Stat. 725 (1878), the subsequent statute and rule of court may supersede the treaty.
[118]Jones, *International Judicial Assistance: Procedural Chaos and a Program for Reform*, 62 YALE L.J. 515, 548-49 (1953).
[119]Report of the Committee on Comparative Civil Procedure and Practice, 1952 Proceedings of the Section of International and Comparative Law of the American Bar Association 123, 126.

tested by a higher member of the official hierarchy until a cabinet minister is reached, whose signature will be known to the consul. Rule 44(a) does not require that the authenticating statement of the consul be based on his own personal knowledge. The chain method of proof is acceptable. The proper working of this method depends on the assumption that all links of the chain are trustworthy. This may be a false assumption in countries not friendly to the United States. There is the same difficulty as to the incumbency of the foreign official who certified the copy. The appointment of a town clerk will not necessarily be proclaimed in an Official Gazette. Consequently the consul's only source of information is the foreign government itself. Friendly foreign governments should and will cooperate; others may not. With respect to authority a question of foreign law is involved. Consequently the consul's attestation may be of dubious value even in a friendly country. In such a case the consul has three alternatives. He may rely on his own knowledge. This he will rarely do.[120] He may refuse to certify as to the foreign law.[121] He may certify, not on his own knowledge, but on the advice of local counsel or of another expert. Under this last method the copy is really admitted on the strength of the expert's opinion. But if the expert is in the control or employ of the foreign government, his opinion may have but limited value. Furthermore such expert need not appear in open court and be subject to cross-examination as he would under the New York rule. In some hostile areas such as China there are no American consuls. Even if there are consuls in the area, the procedure may not work for the reasons stated above. As the United States Government often has an interest in the litigation, a consul may hesitate to certify even though the above objections do not appear. It is not enough for the consul to attest merely genuineness and incumbency. He should also attest authority.[122]

The second method of authentication of a foreign official record of applying state law under Rule 43(a) of the Federal Rules of Civil Procedure may not work either. In some states the statute merely follows Rule 44 of the Federal Rules. In some states the statute does not apply to foreign records. In some states while foreign records are covered the statute requires authentication by the Great Seal of the foreign sovereign. This method may be impractical if the document is in a hostile country. About the only state with satisfactory statutes is New York.[123]

The third method of authentication by common law methods under Rule 44(c) may not be helpful. At common law a copy could be proved by a witness who has personally compared the copy with the original.[124] This method is cumbersome and expensive. It may be impossible if the record is in a hostile country. The only other possible method is by the Great Seal of the foreign sovereign. But often this is not feasible.

[120]Apparently he did in Banco de Espana v. Federal Reserve Bank, 114 F.2d 438, 445-47 (2d Cir. 1940).
[121]United States v. Grabina, 119 F.2d 863, 865 (2d Cir. 1941); New York Life Ins. Co. v. Aronson, 38 F. Supp. 687, 688 (W.D. Pa. 1941).
[122]United States v. Grabina, 119 F.2d 863, 865 (2d Cir. 1941). *Contra*, New York Life Ins. Co. v. Aronson, 38 F. Supp. 687, 688 (W.D. Pa. 1941). In the latter case only genuineness was attested, but not incumbency and authority.
[123]New York Civil Practice Act §§ 395, 398.
[124]5 WIGMORE, EVIDENCE § 1679 (3d ed. 1940).

What then is the solution of the problem as to foreign official records? The methods provided in Rules 44 and 43(a) may be retained. But a new alternative method should be added, namely, the New York method. The New York statute[125] allows authentication by a foreign law expert who testifies that the copy of such patent, record or document has been certified in the manner provided by the laws of such foreign country. In effect the foreign law expert merely attests that the copy appears to him to have been certified as prescribed in the laws of the foreign country. The expert thus confirms the authority of the certifying official in so far as such authority presents an issue of law. But as to genuineness and incumbency the expert will rarely have any knowledge. The New York rule at one time left these matters to the discretion of the trial judge.[126] If reasonable opportunity is given to the opponent to object that should be enough. In New York this rule seemed to work and no abuses were reported. The New York rule was flexible as to genuineness and incumbency. Possibly the law should go a step further and leave the issue of authority to the discretion of the trial judge as well as the other issues. The New York statute is very realistic. In the situation earlier stated the genuineness of Nisi's signature and his incumbency could be authenticated by an American consul or by a competent Italian court or official. With respect to the question of legal custodianship the New York statute recognizes that this question is one of Italian law. The New York statute provides that the certificate covering authority may be made by a New York attorney residing in Italy, an American consul in Italy, an Italian Consular officer in New York, or "such other person as the court may deem qualified." Such a document meeting the requirements of the New York statute, but not authenticated by an American Consul or diplomatic representative could be introduced in a federal court sitting in New York under Rule 43(a) of the Federal Rules of Civil Procedure.[127]

Undue concern about the dangers of a liberal rule as to proof of foreign official records is minimized by the fact that even though a copy of the record may be admissible, it is not conclusive. It is for the trier of the facts to determine its reliability.[128] The court may take into consideration that the foreign record itself, under the foreign law, may be based on evidence which would not be admissible under common law rules of evidence.[129] Furthermore the court may maintain an attitude of healthy skepticism if the original record is in the hands of a government not entitled to trust, or if the authentication of the copy depends on the veracity of statements made by such a government.[130]

[125]New York Civil Practice Act § 398a.

[126]De Yong v. De Yong, 263 App. Div. 291, 32 N.Y.S.2d 505, 508 (1942). In 1953 the statute was amended so as to tighten the requirements as to proof of genuineness and incumbency. N.Y. Sess. Laws 1953, ch. 669, § 3.

[127]Fakouri v. Cadais, 147 F.2d 667, 671 (5th Cir. 1945).

[128]In re Kohn's Estate, 124 N.Y.S.2d 861, 865 (Surr. Ct. N.Y. Co. 1953); In re Kuehnert's Estate, 147 N.Y.S.2d 713, 715 (Surr. Ct. Westch. Co. 1955). The rule may be different as to certificates of citizenship issued by a foreign government, as such certificate proves a governmental determination and not a physical fact such as birth or death. Murarka v. Bachrack Bros., 215 F.2d 547, 553 (2d Cir. 1954); Blair Holdings Corp. v. Rubinstein, 133 F. Supp. 496, 499 (S.D.N.Y. 1955).

[129]In re Kohn's Estate, 124 N.Y.S.2d 861, 865 (Surr. Ct. N.Y. Co. 1953); In re Kuehnert's Estate, 147 N.Y.S.2d 713, 715 (Surr. Ct. Westch. Co. 1955).

[130]Zwack v. Kraus Bros. & Co., 133 F. Supp. 929, 936 (S.D.N.Y. 1955), *aff'd* on this point, 237 F.2d 255, 260 (2d Cir. 1956).

MONTANA LAW REVIEW

Member, National Conference of Law Reviews

Volume 22 Spring 1961 Number 2

EDITORIAL BOARD

Published semi-annually, Spring and Fall, by students of the School of Law, Montana State University, Missoula, Montana